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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1942

Number 348

■

MRS. JOHN HILLEY

Petitioner

v.

WID SPIVEY, SHERIFF

Respondent

■

**Petition for Writ of Certiorari to the
Court of Criminal Appeals of Texas**

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1942



MRS. JOHN HILLEY

Petitioner

v.

WID SPIVEY, SHERIFF

Respondent



Petition for Writ of Certiorari to the Court of Criminal Appeals of Texas

To the SUPREME COURT OF THE UNITED STATES:

Mrs. John Hilley, petitioner, presents this her petition for writ of certiorari¹ and shows unto the Supreme Court of the United States as follows:

¹ With this petition are filed two companion cases, *Daisy Largent, Petitioner, v. Jack Reeves, City Marshal, respondent*, and *Tully B. Killam, petitioner, v. City of Floresville, respondent*, brought here also from the Court of Criminal Appeals of Texas. The city ordinances under which petitioners were convicted are essentially different in their terms. The Comanche ordinance in this case is a license tax law. The Floresville ordinance prohibits and makes unlawful peddling of literature on the public square and on any street within the city, being a prohibitory and not a regulatory ordinance, and does not provide for issuance of license or permit. The Paris ordinance in the *Largent* case is also prohibitory, prohibiting sale of literature at all times in the main business sections of the city of Paris. There is a common question in all three companion cases, that is, the arbitrary, discriminatory denial of the writ of habeas corpus, contrary to the Fourteenth Amendment, and the common question of a fictitious and colorless non-federal question which is intermingled with the federal question. These common questions make it appropriate to consider these three cases together. It is here requested that the Court read and consider the petition filed in this case, with supporting brief, together with the petitions and supporting briefs filed in the two above named companion cases. Although different disposition may be made in each of the three cases, it would conserve time of the Court to consider the three together.

A

Summary Statement of Matters Involved*1. Preliminary Statement.*

Although the ordinance involved in this case is the same kind as that considered in *Jones v. City of Opelika*, Nos. 280, 314 and 966, October Term 1941, 62 S. Ct. 1231, this case nevertheless is not controlled by said decision of this Court of June 8, 1942, because here the ordinance, by its terms, expressly provides an exorbitant and excessive license tax of \$5 per day or \$1,825 per year on the right of exercising the constitutional privileges of freedom of worship of Almighty God and freedom of the press. The daily contributions do not exceed 20 cents, or an annual sum of \$73. The tax is unconstitutional.

An additional question is presented: The constitutional right to the writ of habeas corpus inherently secured by the due process and equal protection clauses of the Fourteenth Amendment has been abridged. Petitioner exhausted all remedies under appellate "machinery" of the state courts of Texas before applying for the writ as allowed by Texas procedure.

2. Statutory Provision Sustaining Jurisdiction.

Section 240(a) of the Judicial Code, 28 U. S. C. A. 347(a), sustains jurisdiction.

3. Validity of the City Ordinance and the State Statute Drawn in Question.

The ordinance in question is that of the City of Comanche,² Texas, which reads as follows:

"AN ORDINANCE

"Providing for the Regulation and Control of Vending, Displaying and Peddling of Goods, Wares, Mer-

² The City of Comanche is a country west-Texas town in the farming and ranching district, with a population of 3,209.

chandise and Other Articles Within the Corporate Limits of the City of Comanche, Providing a License Therefor, and Declaring an Emergency.

"Be it ordained by the City Council of the City of Comanche, Texas :

"Section 1. It shall hereafter be unlawful for any person to use the streets or alleys embraced within the corporate limits of the City of Comanche for the purpose of vending or displaying goods, wares, merchandise or other articles, or for the purpose of peddling goods, wares, merchandise or other articles, without such person first having obtained a license therefor, said license to be issued by the City of Comanche. Provided, however, that this ordinance shall not apply to any person who offers for sale, or sells, any farm products.

"Section 2. Before any person shall be permitted to use the streets or alleys within the corporate limits of the City of Comanche for the purpose of vending or displaying goods, wares, merchandise or other articles, or for the purpose of peddling goods, wares, merchandise or other articles, such person shall first obtain from the City of Comanche a license therefor, and pay for same at the rate of Five (\$5.00) per day or a fraction thereof.

"Section 3. Any person violating any of the provisions of this ordinance shall be guilty of a misdemeanor, and upon conviction shall be fined in any sum not exceeding Twenty-five (\$25.00) Dollars.

"Section 4. Due to the fact that the City of Comanche does not at this time have an adequate ordinance covering the vending, displaying, and peddling of goods, wares and merchandise and other articles upon the streets and alleys within its corporate limits, and that an imperative public necessity exists therefor, the constitutional rule requiring that ordinances shall be read upon three separate days is hereby suspended, and

this ordinance shall become effective immediately upon publication."

R. 4, 5.

The State statute, the validity of which is drawn in question is Article 53 of the Code of Criminal Procedure of Texas, 1925, reading as follows:

"The Court of Criminal Appeals shall have appellate jurisdiction co-extensive with the limits of the State in all criminal cases. This article shall not be so construed as to embrace any case which has been appealed from any inferior court to the county court or county court at law, in which the fine imposed by the county court or county court at law shall not exceed one hundred dollars."

4. Date of Judgment and Order to be Reviewed.

The order remanding petitioner to custody was affirmed by judgment of the Court of Criminal Appeals entered on April 8, 1942. (R. 30) Petitioner duly filed her motion for rehearing on April 17, 1942, (R. 30) and judgment overruling the motion was duly entered on June 3, 1942. (R. 32) Time for filing petition for certiorari expires September 3, 1942. Petition is filed within such time.

5. Time and Manner in which Questions Raised Below.

At the trial de novo in the County Court by motion to quash, (R. 8-10 and 11-12) by requested charge number one, (R. 10-11) by motion for directed verdict at the close of all the evidence, (R. 20) and by specific allegations in the application for writ of habeas corpus filed in the District Court, petitioner attacked the ordinance in question as being in violation of the First and Fourteenth Amendments to the United States Constitution, because by its terms and as construed and applied, petitioner was denied her rights of freedom of press and worship of Almighty God.

All these various contentions were overruled by the

County and District Courts to which petitioner excepted.

When the application for writ of habeas corpus was heard in the District Court at Comanche, no question was raised as to the right to the writ of habeas corpus. That right to writ was admitted in the trial court. Writ was discharged because trial court believed the ordinance to be constitutional and not on ground that writ was not proper remedy. Under the decisions of the Court of Criminal Appeals, the writ of habeas corpus was the appropriate remedy to secure the release of one illegally restrained of his liberty in violation of the Constitution. In the Court of Criminal Appeals on appeal petitioner took the position that habeas corpus was the proper remedy to secure her release and that the Court of Criminal Appeals had the power of review because the ordinance was unconstitutional on its face and as construed and applied. (R. 27-28) The majority opinion of the Court of Criminal Appeals, over the protest of the minority opinion, for the first time in these proceedings raised the contention that Article 53 (C. C. P. of Texas) deprived the Court of Criminal Appeals, in cases such as this, of its appellate jurisdiction in habeas corpus cases conferred upon it by Article 857 (C. C. P. of Texas). R. 29.

Under grounds 3 and 5 of the motion for rehearing filed in Court of Criminal Appeals,³ petitioner attacked the validity of Article 53 (C. C. P. of Texas) as construed and applied by the Court of Criminal Appeals on the ground that it violated the due process and equal protection clauses of the Fourteenth Amendment to the United States Constitution, in denying the writ of habeas corpus, an inherent right guaranteed by the Fourteenth Amendment. The Court of Criminal Appeals admits that it has the duty to take jurisdiction or appellate jurisdiction in habeas corpus cases where one is convicted under an ordinance found to be un-

³ This was timely because the Court of Criminal Appeals urged the point for the first time in the majority opinion on April 4, 1942. See *Brinkerhoff* case, *infra*, page 30, this brief.

constitutional on its face. That court for the first time held that the power did not exist if ordinance was unconstitutional as applied, and affirmed on this ground. The action of the Court of Criminal Appeals is a subterfuge to deny petitioner her constitutional rights of freedom of press and of worship of Almighty God. R. 29.

6. *Opinions of the Courts Below.*

The trial courts did not render or file opinions. The Court of Criminal Appeals' opinion, and dissenting opinion of Judge Graves, is reported in 162 S. W. 2d 428 (R. 29) The majority opinion and dissenting opinion in the companion case of *Ex parte Largent* is reported in 162 S. W. 2d 419. See Largent Record, pages 24 to 35.

7. *Statement of Facts.*

In the Corporation Court of the City of Comanche, petitioner was charged by complaint with an alleged violation of the aforesaid ordinance on March 17, 1941, in which she did offer and display for sale booklets and pamphlets without having a license permit issued by the City of Comanche as required by said ordinance. (R. 5 and 12-13) On a trial petitioner was convicted in the Corporation Court, recorder's court for the City of Comanche, and duly appealed to the County Court of Comanche County in the time and manner required by the Code of Criminal Procedure of Texas. In the County Court there was a trial de novo before the judge and to a jury, who received evidence. (R. 6) There was no material dispute in the testimony of the witnesses for the State and the defense. The evidence showed that the petitioner was an ordained minister of Jehovah God, preaching the Gospel of God's Kingdom publicly upon the streets of the City of Comanche by means of distribution of literature explaining Bible prophecy, which she distributed to passers-by on the sidewalk offering to receive money contributions, sometimes receiving money contributions and other times the literature was distributed free. This was her way of worshiping Almighty God. The work she was

doing was for the purpose of aiding people of good-will and to "feed the Lord's other sheep". She had been innstructed by the local police to stay off the streets with the Bible literature but she refused to do so. This refusal was not because she desired to flout the law, but was because she desired to obey Almighty God. The *Watchtower* magazine which she was distributing was offered in evidence and portions thereof read to the jury.

The Watchtower is published for the purpose of enabling the people to know Jehovah God and His purposes as expressed in the Bible. It publishes Bible instruction specifically designed to aid Jehovah's witnesses and all people of good-will. It arranges systematic Bible study for its readers, and the Watch Tower Bible and Tract Society, its publishers, supplies other literature to aid in such studies. It publishes suitable material for radio broadcasting and for other means of public instruction in the Scriptures. *The Watchtower* strictly adheres to the Bible as authority for its utterances, being strictly free and separate from all religion, parties, sects or other worldly organizations. It is wholly and without reservation for the kingdom of Jehovah God under Christ His beloved King. It is not dogmatic, but invites careful and critical examination of its contents in the light of the Scriptures. It does not indulge in controversy, and its columns are not open to personalities. *The Watchtower* advocates that Jehovah God is the only true God, Maker of heaven and earth, and the Giver of life to His creatures; that God created the earth for man, originally made perfect, and placed man upon it; that man willfully disobeyed God's law and was sentenced to death, and by reason thereof, death came upon all the descendants of the first man, Adam; that Jesus Christ was made human through the miraculous conception and birth and suffered death in order to provide a redemptive price, for those only of mankind who desire to serve Jehovah God and live; that Jesus Christ was thereafter raised unto heaven and placed at the right hand of Jehovah God, his Father, to be the King

of Jehovah's everlasting government, The THEOCRACY, and thereafter proceeded to oust the adversary Satan and his legion of wicked angels from heaven; that Satan is now attempting to turn all mankind away from God and into destruction and to violently oppose and destroy those who dare to act as witnesses for Jehovah God, his Word, and his Kingdom, as did Christ Jesus when he was on earth; that Christ Jesus is the great Executioner of the Supreme Judge and is now proceeding to execute judgment of everlasting destruction upon Satan's governments and all supporters thereof, invisible and visible in the earth, at Armageddon, which is very near, following which there will be established completely and fully in the earth the righteous government for which Christ Jesus taught all true servants of Jehovah to pray.

An examination of the *Watchtower* magazine conclusively proves, therefore, that its pages from cover to cover contain a written sermon explaining the foregoing matters in greater detail.

The Watchtower contains a notice that persons who by reason of infirmity, poverty or adversity are unable to contribute or pay the annual subscription fee may obtain the same free and without charge. See inside cover of *The Watchtower*.

The jury returned a verdict finding the petitioner guilty and assessing a fine. Thereupon the County Court rendered a judgment assessing a fine in the amount of \$15 and costs. (R. 6) Warrant and capias profine was issued on judgment. R. 7.

Under the law of Texas, when one is convicted in the justice of the peace, corporation, or recorder's court, of a city, he may appeal to the County Court, a court of original jurisdiction. Upon such appeal a trial de novo is had. If the fine assessed in the County Court does not exceed \$100 the right of further appeal to the Court of Criminal Appeals is denied by statute. (Article 53, C. C. P. of Texas)

Under the sections of the Code of Criminal Procedure

relating to habeas corpus, a rule and FUNDAMENTAL RIGHT of procedure has been adopted whereby any individual thus convicted in the County Court and who has no right of further statutory appeal when not fined in an amount in excess of \$100, may apply, by petition for writ of habeas corpus, to the County Court, the District Court, or the Court of Criminal Appeals, or any judge thereof, to procure his release from said judgment of conviction, and may be discharged if it is alleged and proved that he is illegally restrained of his liberty in violation of the Constitution. The Constitution of Texas confers upon the Court of Criminal Appeals in such habeas corpus cases unrestrained and unlimited appellate jurisdiction to review the judgment entered in said habeas corpus proceedings.

Judge Lockridge of the Comanche County Court signed a certificate that he would deny an application for writ of habeas corpus if presented to him. R. 21.

Petitioner duly presented to the judge of the District Court of Comanche County, a court of general original jurisdiction, her application for writ of habeas corpus in which she alleged that by reason of the foregoing facts she was illegally restrained of her liberty and further expressly alleged that the ordinance in question was in direct violation of the Texas Constitution and the First and Fourteenth Amendments to the United States Constitution. To this application for writ of habeas corpus presented to the district judge was attached a copy of the ordinance, a complete report of the proceedings with all exhibits and the judgments of conviction entered by the County Court. R. 1-27.

A hearing was had before the judge of the District Court on June 28, 1941, at which evidence was received, consisting of the papers and exhibits attached to the application for writ of habeas corpus. (R. 23-25, 26) At the conclusion of the hearing, the District Judge entered an order remanding petitioner to the custody of the respondent, Wid Spivey, to which action petitioner excepted and duly gave notice of appeal to the Court of Criminal Appeals and pending said appeal,

petitioner was released on bond duly filed and approved. (R. 23-24) Transcript of the habeas corpus proceedings before the District Judge was duly approved and filed and appeal perfected to the Court of Criminal Appeals. R. 1-27.

On November 17, 1941, petitioner's appeal was argued before the Court of Criminal Appeals, together with three companion cases involving Jehovah's witnesses appealed to said Court in habeas corpus proceedings from the County Courts of Kerr, Comanche, Wilson and Lamar counties. The appeal in one of the companion cases styled *Ex parte J. D. Carter* (156 S. W. 2d 986) from Kerr County Court, was reversed, the writ of habeas corpus granted, and the relator J. D. Carter, fined less than \$100.00, was discharged, because the State statute under which he had been convicted was found to be unconstitutional on its face.

On April 4, 1942, two of the remaining companion cases, together with the case involved in this petition, were affirmed.

While the subterfuge holding of the Court of Criminal Appeals that the writ of habeas corpus is not available to petitioners in those cases is the same as the holding in that regard in this case, yet those cases present ordinances of a different type from that involved here, under which said petitioners were convicted, it is considered appropriate that said cases likewise be presented to this Court as companion petitions with this petition for writ of certiorari.

The Court of Criminal Appeals' disposition of the questions presented in this case is not based on an independent, non-federal ground, but the action of such court is a manifest subterfuge to avoid the decision of the federal question and to add to the wrong done by denial of petitioner's rights. The majority opinion of the Court of Criminal Appeals intermingles the purported non-federal question with the federal question to such an extent that it is dependent entirely upon the disposition of the federal question involved as to make necessary a review by this Court.

That court holds that if the ordinance is unconstitutional

on its face, then it has jurisdiction to consider and determine the question. That court found the ordinance to be valid on its face under the federal constitution. This makes necessary a review of the *so-called* "non-federal" question.

B

Questions Presented

By reason of the foregoing, there were seasonably presented to the courts below and there now are presented to this Court for review substantial federal questions as follows:

1. Is the ordinance in question unconstitutional and void on its face and as construed and applied to petitioner because it unduly abridges and burdens, by excessive \$1,825 annual license tax, her rights of freedoms of speech, press and worship of Almighty God, contrary to the First and Fourteenth Amendments to the United States Constitution?

2. Does Article 53 of the Code of Criminal Procedure of Texas, 1925, as construed and applied by the Court of Criminal Appeals of Texas, unduly deny petitioner of her right to the inalienable and inherent writ of habeas corpus in violation of the due process and equal protection clauses of the Fourteenth Amendment to the United States Constitution?

3. Did the Court of Criminal Appeals of Texas err in affirming the judgment of the trial court, remanding petitioner to custody of respondent?

C

Reasons Relied on for Allowance of Writ

This petition for writ of certiorari should be granted in sound discretion of this Court because the trial court and the Court of Criminal Appeals of Texas have decided contrary to applicable decisions of this Court an important question of constitutional law, i.e., the validity of the license

tax law, containing an excessive burden upon freedom of press and freedom of worship by the illegal imposition of a \$5 daily license tax for the exercise of said constitutional rights, which amounts to \$1,825 per year.

Furthermore, the Court should take jurisdiction and grant the writ because the validity of a license tax in any sum has not yet been finally determined by this Court. At the present time there is pending a motion for rehearing in the case of *Jones v. City of Opelika* (Nos. 280, 314 and 966, October Term 1941), 62 S. Ct. 1231, and it is hoped that such motion will be granted. If not, this Court should grant the writ here because the Court can take judicial notice, without any detailed auditor's and referee's report, that the Comanche license tax is exorbitant and unreasonably excessive in amount when applied to persons who pamphleteer for charitable, political or "religious" purposes. In holding the ordinance valid as construed and applied, the Court of Criminal Appeals and the trial court decided contrary to previous decisions of this Court.⁴

In each of the above cases the identical type of license law was knocked down because a direct burden on the guaranteed constitutional right was there involved. These cases cannot be distinguished from the case at bar and are controlling authority here. Read *Di Santo v. Pennsylvania*, 273 U. S. 34, 39, where this Court held that this type of law is "likely to be used as an instrument of discrimination".

The decision is also in direct conflict with other cases.⁵

We adopt the dissenting opinion of Judge Graves of the

⁴ See *Robbins v. Shelby County Taxing Dist.*, 120 U. S. 489, 494-496; *Caldwell v. North Carolina*, 187 U. S. 622, 624-632; *Rearick v. Pennsylvania*, 303 U. S. 507, 510-513; *Dozier v. Alabama*, 218 U. S. 124, 126-128; *Real Silk Hosiery Mills v. City of Portland*, 268 U. S. 325, 335-336; *Davis v. Virginia*, 236 U. S. 697; *Stewart v. Michigan*, 232 U. S. 655; *Rogers v. Arkansas*, 227 U. S. 401; *Crenshaw v. Arkansas*, 227 U. S. 389.

⁵ *Blue Island v. Kozul*, 371 Ill. 511, 41 N. E. 2d 515; *McConkey v. City of Fredericksburg*, 179 Va. 556, 19 S. E. 2d 682; *State v. Greaves*, 112 Vt. 222, 22 A. 2d 497; *South Holland v. Stein*, 373 Ill. 472, 26 N. E. 2d 868; *Lovell v. City of Griffin*, 303 U. S. 444, *Schneider v. State*, 308 U. S. 147; and *Cantwell v. Connecticut*, 310 U. S. 296.

Court of Criminal Appeals of Texas, as part of our reasons why the writ should be allowed. Largent R. p. 28.

It cannot be successfully contended that the Court of Criminal Appeals based its decision on an adequate and independent non-federal ground, for the action of that court is a colorless and deliberate effort to suppress petitioner's constitutional rights of freedom of press and of worship by avoiding a discussion of the validity of the ordinance on its face and as construed and applied by the city of Comanche, Texas. In circumstances indential with the case at bar, the writ of habeas corpus is held to be the only remedy and the proper remedy for one convicted on a trial de novo in the County Court for an alleged violation of a city ordinance where the fine does not exceed \$100 and who is illegally restrained of his liberty in violation of the Constitution.⁶

The holding of the Court of Criminal Appeals that the writ of habeas corpus is not available is also directly in conflict with *Smith v. O'Grady*, 312 U. S. 329.⁷

See also dissenting opinion of Judge Graves of the Court of Criminal Appeals in the case at bar, and the opinion of Judge Beauchamp of the Court of Criminal Appeals in the companion *Killam* case, on Rehearing.

The Court of Criminal Appeals in its construction of Article 53 of the Code of Criminal Procedure, has violated the equal protection and due process clauses of the Fourteenth Amendment to the United States Constitution, in that it affords its appellate jurisdiction in habeas corpus cases to persons illegally restrained of their liberty if or-

⁶ *Ex parte Roquemore*, 131 S. W. 1101; *Ex Parte Degener*, 17 S. W. 1111, 1115; *Ex parte Meador*, 248 S. W. 348; *Ex parte Jarvis*, 3 S. W. 2d 84; *Ex parte Slawson*, 141 S. W. 2d 609, 610; *Ex parte Spelce*, 119 S. W. 2d 1033, 1037; *Ex parte Jones*, 81 S. W. 2d 706; *Ex parte McCormick*, 81 S. W. 2d 104; *Ex parte Foster*, 71 S. W. 2d 593, 595; *Ex parte Patterson*, 42 Tex. C. R. 256, 58 S. W. 1011; *Ex parte Baker*, 78 S. W. 2d 610.

⁷ See also *Mooney v. Holohan*, 294 U. S. 104, 113; *Moore v. Dempsey*, 261 U. S. 86, 90; *Robert v. Connally*, 111 U. S. 624, 637; *Yick Wo v. Hopkins*, 118 U. S. 356, 373-374; *Ex parte Calhoun*, 91 S. W. 2d 1047; *Cochran v. State of Kansas*, No. 510 Oct. Term 1941 (May 11, 1942) 62 S. Ct. 1068; *McCormick v. Sheppard*, 86 S. W. 2d 213; *Herndon v. Lowry*, 201 U. S. 242.

dinance void on its face and discriminates against individuals convicted under similar circumstances under an ordinance unconstitutional as construed and applied. This very charge of discrimination is proved in these four cases involving Jehovah's witnesses argued jointly before the Court of Criminal Appeals on November 17, 1941. In the case of *Ex parte Carter*, supra, the Court of Criminal Appeals discharged Carter, one of Jehovah's witnesses convicted on trial de novo in County Court under circumstances identical with the case at bar. Furthermore after the cases were argued, that court, in another case styled *Ex parte Faulkner*, 158 S. W. 2d 525, entertained an appeal in habeas corpus case identical with the case at bar.

See also the case of *Ex parte Lewis*, 147 S. W. 2d 478. There the Court of Criminal Appeals took jurisdiction, and discussed the merits of the case, although they found the ordinance valid on its face. At no time did they question the jurisdiction of the court even though the fine on trial de novo in the County Court did not exceed \$100. See also the case of *Ex parte Lewis*, 45 Tex. C. R. 1, 73 S. W. 811.

It is therefore manifest that the Court of Criminal Appeals of Texas arbitrarily and evasively considered the federal questions presented and the refusal of that court to take jurisdiction is itself a denial of due process and is not an adequate non-federal question to support the judgment of the Court of Criminal Appeals. See the cases.⁸

⁸ *Brinkerhoff-Faris Trust & Savings Co. v. Hill*, 281 U. S. 673, 678-682; *People of N. Y. ex rel. Bryant v. Zimmerman*, 278 U. S. 63, 70-71; *Rogers v. Alabama*, 192 U. S. 226, 230-231 (Motion to quash struck because prolix and verbose); *Davis v. Wechsler*, 263 U. S. 22, 24 (Waiver of venue by appearance); *Love v. Griffith*, 266 U. S. 32 (Appeal dismissed because moot question); *N. Y. C. Ry. Co. v. N. Y. & Pa. Co.*, 271 U. S. 124, 126-127 (Federal question not waived because of failure to appeal from former ruling); *German Savings & Loan Soc. v. Dormitzer*, 192 U. S. 125, 128 (Estoppel not sufficient); *Postal T. & C. Co. v. Newport*, 247 U. S. 464, 473, 475-476 (Res adjudicata, estoppel and waiver through agreement); *Brown v. Mississippi*, 297 U. S. 278 (Failure to move to exclude evidence); *Patterson v. Alabama*, 294 U. S. 600, 603-607, (Striking of motion for new trial and the bill of exceptions containing evidence); *Lawrence v. State Tax Com.*, 286 U. S. 276, 282-283.

Whether or not the federal question is properly brought before the Court of Criminal Appeals for determination by that court, it is a federal question. *Lovell v. City of Griffin*, 303 U. S. 444, 454-455.

An analysis of the above decisions indicates that the non-federal ground must be broad enough to sustain a judgment and that it must be independent and not so interwoven with the federal question as to be incapable of separate treatment and determination. A non-federal ground which is plainly untenable will not defeat review by this Court.

Furthermore, the *so-called* non-federal question is itself a federal question in this, that the writ of habeas corpus specifically guaranteed by the Federal and State constitutions has been denied the petitioner in violation of the due process and equal protection clauses of the Fourteenth Amendment. The writ of habeas corpus is unquestionably one of the fundamental, inalienable rights of the citizen. *Slaughter House Cases*, 16 Wall. 36, 79; *Corfield v. Coryell*, 4 Wash. (U. S.) 371, 380. Mr. Justice Roberts approved for this Court the *Slaughter House Cases*, in his opinion in *Hague v. C. I. O.*, 307 U. S. 496, mentioning habeas corpus as one of the rights of the citizen granted by the Federal Constitution.

If the "non-federal" subterfuge of the Court of Criminal Appeals of Texas is sustained, direct appeals from all of the county courts of Texas to this Court become necessary in circumstances such as these. The holding of the Court of Criminal Appeals makes this Court the only court to which Jehovah's witnesses can appeal. There are 250 county courts in Texas. Now hundreds of Jehovah's witnesses are appealing from their great distresses in Texas in the recorder, justice and corporation courts, of that state, to the County Courts in the great state. Should adverse decisions result in those cases, will the Supreme Court of the United States be the only court to which they can appeal?

Will this Court advise the Court of Criminal Appeals of Texas as follows?—

“Upon the state courts equally with the courts of the Union rests the obligation to guard and enforce every right secured by that Constitution.⁹ In view of the dominant requirement of the Fourteenth Amendment we are not at liberty to assume that the State has denied to its courts jurisdiction to redress the prohibited wrong upon a proper showing and in an appropriate proceeding for that purpose.” (*Mooney v. Holohan*, 294 U. S. 103, 113.)

The questions presented as to the validity of the ordinance in question and the right to the writ of habeas corpus are of national importance and seriously affect the fundamental civil and personal rights of every person within the United States. The Court of Criminal Appeals of Texas has so far departed from the accepted and usual course of judicial procedure and decided an important federal question in conflict with prior decisions of this court in an arbitrary and evasive manner as to call for the exercise of this Court's power of supervision to halt the same.

As our further reasons why this petition for writ of certiorari should be granted we refer to the entire dissenting opinion of Judge Graves of the Court of Criminal Appeals in the companion *Largent* case, and make the same a part hereof as though copied at length herein. (R. 29) See also the Record in the *Largent* petition for certiorari, pages 28-35.

WHEREFORE your petitioner prays that this Court issue a writ of certiorari to the Court of Criminal Appeals of Texas, directing such court to certify to this Court for review and determination on a day certain to be therein named, a full and complete transcript of the record and all proceedings in the case as numbered and entitled on the

⁹ *Robert v. Connally*, 111 U. S. 624, 637.

docket of said court; and that the decree of the said court affirming the judgment of the trial court be reversed and the judgments of the trial court be reversed and that your petitioner may have such other and further relief in the premises as to this Court may seem just and proper under the circumstances.

MRS. JOHN HILLEY

Petitioner

By HAYDEN C. COVINGTON

117 Adams Street

Brooklyn, New York

Attorney for Petitioner

SUPPORTING BRIEF

Specification of Errors

The petitioner assigns the following errors in the record and proceedings of said cause:

The Court of Criminal Appeals of Texas committed fundamental error in affirming judgment of the trial court because

1) The ordinance in question is unconstitutional and void on its face and as construed and applied to petitioner because it unduly abridges and burdens, by excessive \$1,825 annual license tax, her rights of freedoms of speech, press and worship of Almighty God, contrary to the First and Fourteenth Amendments to the United States Constitution.

2) Article 53 of the Code of Criminal Procedure of Texas, 1925, as construed and applied by the Court of Criminal Appeals of Texas, unduly denies petitioner her right to the inalienable and inherent writ of habeas corpus, in violation of the due process and equal protection clauses of the Fourteenth Amendment to the United States Constitution.

ARGUMENT

Invalidity of the Ordinance

We submit that the validity of the ordinance of the City of Comanche is not controlled by the case of *Jones v. City of Opelika*, supra, because here a \$5 daily tax, or \$1,825 annual tax, is required as a condition precedent to the exercise of constitutional rights; therefore, the "fees" are not small, but are "a substantial clog upon activities of the sort here involved". (*Jones v. City of Opelika*, supra) We still contend that this requirement that the license tax be assailed is a ridiculous and burdensome requirement and nullifies the right to make the Constitution a defense. See motion for rehearing in *Jones v. City of Opelika*, supra, and petition for writ of certiorari in *Busey v. District of Columbia*, now filed with this Court.

The validity of this sort of law was argued as exhaustively and extensively as it is possible to do in the briefs, reply briefs and *amicus curiae* briefs filed in the cases styled *Jones v. City of Opelika*, etc., supra, and reference is here made to same. The fallacy of the Court's opinion is clearly pointed out in the motion for rehearing filed in *Jones v. City of Opelika*, supra, and reference is here made to such.

Similarly the invalidity of this sort of license tax law is discussed in the foregoing *Busey v. District of Columbia* petition for certiorari and reference is made to such; see pages 13 to 22 of such petition.

It is interesting to note that the majority opinion in *Jones v. City of Opelika*, supra, entirely overlooks and ignores the well known struggle for freedoms of worship and press under the "stamp tax" laws of England. The freedom of such rights means a freedom from burdensome taxation as well as from censorship, but a contrary statement appears in the majority opinion (*Jones v. City of Opelika*, 62 S. Ct. 1231), "It is prohibition and unjustifiable abridgement which is interdicted, not taxation." The majority opin-

ion says that it is difficult for them to see in the Bill of Rights a shadow of prohibition of the exercise of such freedoms in taxation thereof. Those who wrote the Bill of Rights had in mind specifically the stamp taxes to safeguard against in the Bill of Rights, when the words of the First Amendment were written, for they had shortly before engaged in a bloody rebellion to throw off the burden of the stamp taxes.¹⁰ Those who participated in the *Jones v. City of Opelika* case could easily refresh their memory of this matter by referring to the words of the lately deceased Mr. Justice Sutherland, in *Grosjean v. American Press Co.*, 297 U. S. 233, 243-249, where an excellent short summary of the historical background of burdensome and prohibitory taxes on freedom of the press is reviewed.

The license tax provided in this case cannot be distinguished from the stamp taxes; as a matter of fact it is even more burdensome and objectionable. Therefore it is difficult for us to see how the majority in the *Jones* case can say that taxation of this sort was not a prohibitive burden upon such freedoms, safeguarded against by the Bill of Rights.

It cannot be contended that this is one of the ordinary forms of taxation to support the government such as that contemplated in *Associated Press v. N.L.R.B.*, 301 U. S. 103, 130, 141. The greater the number of distributors in a city, the greater the tax. The greater the tax is made, the greater the burden becomes. In other words, the government must depend for support upon taxation of the privileges and rights that it was established to protect. To sustain this tax

¹⁰ See *Bridges v. California*, 314 U. S. 252, where this Court said: "No purpose in ratifying the Bill of Rights was clearer than that of securing for the people of the United States much greater freedom of religion, expression, assembly, and petition than the people of Great Britain had ever enjoyed. . . . Ratified as it was while the memory of many oppressive English restrictions on the enumerated liberties was still fresh, the First Amendment cannot reasonably be taken as approving prevalent English practices. On the contrary, the only conclusion supported by history is that the unqualified prohibitions laid down by the framers were intended to give to liberty of the press, as to the other liberties, the broadest scope that could be countenanced in an orderly society."

would be the same as saddling a giant upon a small and helpless beast of burden; the disastrous result is obvious. It seems that the government, federal and states and their subdivisions, should be strong enough to protect themselves by confining taxation activities to the ordinary form of taxation without reaching out to destroy the very life of the people and their inherent fundamental rights established by the Bill of Rights, which the government and its various employees, judicial and otherwise, are sworn servants of the people to protect.

The First Amendment prohibits the abridgment of these freedoms. "Abridge" means to *shorten, curtail or reduce*, and comes from the same root word as *abbreviate*. The word "abridge" does not mean *destroy, forbid, prohibit or prevent*. The Congress and the states may not pass, enact or enforce any law which in any way reduces or burdens such freedoms. In order to show the ordinance here to be invalid, it is not necessary to establish that the ordinance denies, destroys or prohibits freedoms of speech, press and worship. It is sufficient merely to show that the freedoms are burdened.

The First and Fourteenth Amendments place freedom of press and of worship in a favored position and give to them a status not accorded to commercial enterprises of various sorts. The newspapers have been recognized by this Court for special favors because of the special contribution they make to the public welfare. *United States ex rel. Milwaukee Social Democratic Publishing Co. v. Burleson*, 255 U. S. 407, 410. Liberty of circulation is as essential to freedom of press as is liberty of publication; without circulation, publishing is of no value. *Ex parte Jackson*, 96 U. S. 727, 733; *Grosjean v. American Press Co.* 297 U. S. 233, 250-251; *Lovell v. City of Griffin*, 303 U. S. 444.

Taxation has constantly been one of the prohibitive methods employed to abridge and burden freedoms of press

and of worship; and since the license taxes of the sort here involved greatly restrict circulation and are therefore burden upon freedom of the press, it would seem that the Court in the *Jones* case misapprehended the scope of the limitations contained in the First Amendment. Those limitations are not confined to prohibitive laws which abridge and burden, by taxation or any other device, those freedoms even though such laws do not completely destroy them.

In regard to the *Grosjean* case, supra, the taxing act there involved was held unconstitutional on the SOLE GROUND that it was a restriction upon circulation on the newspapers taxed and was held to be an abridgment of the freedom of the press. This Court expressly limited its opinion on this question and stated that it did not have to pass on any question of discrimination. As a matter of fact the unfair discrimination ground urged in the *Grosjean* case was ignored by this Court. We assert that the license tax here involved cannot be distinguished from the tax law involved in the *Grosjean* case. Furthermore, the license tax law here is identical with the license tax laws declared invalid under the commerce laws in more than thirteen cases cited in *McGoldrick v. Berwind-White Co.*, 309 U. S. 33, 55-57. It should be kept in mind that the construction placed on this ordinance by the Texas courts so as to include literature containing information and opinion within the terms "goods, wares, merchandise or other articles" makes the same invalid on its face because it is a direct burden upon freedom of the press in violation of the First and Fourteenth Amendments and therefore it was the duty of the Court of Criminal Appeals, under the prevailing practice of Texas, to take jurisdiction on the application for writ of habeas corpus. Since the undisputed evidence was that this was petitioner's way of worship, then the ordinance as applied is unconstitutional because it unlawfully abridges her right of freedom to worship Almighty God. Denial of the right of writ of habeas corpus in such circumstances, when at the same time the writ is allowed where the ordinance is unconstitu-

tional on its face, results in judicial discrimination of the worst kind in violation of the due process and equal protection clauses of the Fourteenth Amendment. The refusal of the Court of Criminal Appeals to take jurisdiction cannot be justified on any non-federal ground.

Discriminatory Denial of Habeas Corpus Process

In Texas the writ of habeas corpus is declared to be the principal bulwark of human liberty in that State. *Ex parte Calhoun*, 91 S. W. 2d 1047.

The Texas courts also hold that the writ of habeas corpus is available to any person restrained of his liberty, regardless of the offense charged. The proceedings for habeas corpus is independent of the offense charged. *McCormick v. Sheppard*, 86 S. W. 2d 213.

Although habeas corpus is a collateral attack upon prior judicial proceedings questioned therein (*Ex parte Travis*, 123 Tex. 480, 73 S. W. 483, 489), nevertheless if the ordinance is unconstitutional the proceedings thereunder are absolutely void.¹¹

The Code of Criminal Procedure of Texas provides that one convicted in the recorder or corporation court of a city or in one of the justice of the peace courts may appeal to the County Court where a trial de novo is had. If at the trial in the County Court he is fined in a sum not to exceed \$100, no further right of appeal is available in the courts of Texas on such questions as procedural errors, perjured testimony or lack of and insufficiency of evidence. However, one thus convicted under a law which has been repealed or which does

¹¹ *Ex parte Smith*, 122 Tex. C. R. 534, 56 S. W. 2d 874; *Ex parte Curtis*, 98 S. W. 2d 195; *Ex parte Cox*, 53 Tex. C. R. 240, 101 S. W. 369; *Ex parte Cain*, 56 Tex. C. R. 538, 120 S. W. 999; *Ex parte Farnsworth*, 61 Tex. C. R. 342, 135 S. W. 535; *Ex parte Patterson*, 42 Tex. C. R. 256, 58 S. W. 1011; *Ex parte Battis*, 40 Tex. C. R. 112, 48 S. W. 513; *Ex parte Neill*, 32 Tex. C. R. 275, 22 S. W. 923; *Ex parte Garza*, 28 Tex. C. R. 381, 13 S. W. 779; *Ex parte Pierce*, 125 Tex. C. R. 470, 75 S. W. 2d 264.

not apply to his conduct, or if the law under which he is convicted is unconstitutional, he is provided a remedy under the procedure of Texas by way of writ of habeas corpus on the ground that he is illegally restrained of his liberty. The application for writ of habeas corpus can be made directly to the Court of Criminal Appeals as an original proceeding. *Ex parte Roquemore*, 131 S. W. 1101; *Ex parte Lewis*, 45 Tex. C. R. 1, 73 S. W. 811; *Ex parte Baker*, 78 S. W. 2d 610; *Ex parte Patterson*, 58 S. W. 1011, 42 Tex. C. R. 256.

This remedy is available even though the one convicted in the corporation or justice court does not exhaust his remedies of appeal to the County Court. *Ex parte Roquemore*, supra; *Ex parte Lewis*, 73 S. W. 811; *Ex parte Baker*, supra; *Ex parte Patterson*, supra; *Ex parte Jarvis*, 3 S. W. 2d 84.

The holding of the Court of Criminal Appeals that the remedy of habeas corpus is not available conflicts directly with decisions of that court that have not been overruled. See *Ex parte Roquemore*, supra, where the court said:

"We are met at the threshold of the case with the suggestion by our able assistant attorney general that the writ of habeas corpus cannot apply in this character of proceeding; that it is sought merely as a method of appeal or supersedeas, and under the authority of the cases of *Ex parte Schwartz*, 2 Texas App. 448, 17 S. W. 1076, and the still later case of *Ex parte Cox*, 53 Tex. Cr. Rep. 240, 101 S. W. 369, cannot be sustained, and that the judgment of the inferior court can only be attacked by writ of habeas corpus for such illegalities as rendered them void. . . .

"That these general rules obtain there can be no sort of question, but, as we believe, they have no application to the case here. The sole matter in controversy in this case is as stated in the agreed statement of facts . . . or whether the facts heretofore agreed upon make

an offense denounced by article 199. . . . So that we are confronted with the question as to whether in this state it is unlawful for one, the proprietor of a baseball park, to permit a game to be played therein on Sunday, or to cause a game to be played on Sunday therein where an admission charge is made. If there is no such law, then manifestly no offense is charged, and none could be charged upon any state of case made by this record, or could be predicated upon any state of facts reasonably applied to the condition of the relator.

[A discussion of the construction of the particular statute follows with the conclusion that the acts of relator were not included within the terms thereof.]

" . . . We are not therefore concerned here with the issue or question as to whether the legislature could enact a law prohibiting baseball on Sunday, but rather with the question as to whether they have so enacted. . . .

"We have not felt it necessary, and indeed it would be out of place, to express any view as to whether baseball should be prohibited on Sunday, but have contented ourselves with deciding that under the statute as it now stands it has not been prohibited. Believing that the law under which relator is sought to be held does not make the act set forth an offense, it is ordered that he be, and is hereby discharged."

See also the case of *Ex parte Wall*, 91 S. W. 2d 1065, where the Court of Criminal Appeals said:

"As the matter appears here, there is an absolute absence of proof from any witness or from any source that the [relator] appellant had committed an offense. In the absence of proof or at least evidence, that he committed an offense, the appellant's detention cannot be sustained."

and writ of habeas corpus was issued by that court.¹² See also *Ex parte Meador*, 248 S. W. 348, *Ex parte Degener*, 17 S. W. 1111, 1115, *Ex parte Kearby and Hawkins*, 34 S. W. 635, 962. See also cases where the fine did not exceed \$100 on trial de novo in the County Court and the writ was nevertheless issued on appeal by the Court of Criminal Appeals.¹³

This case is controlled by the case of *Smith v. O'Grady*, 312 U. S. 329, where Mr. Justice Black, speaking for this Court, said:

" . . . before examining the pleadings in order to determine whether the allegations showed a deprivation of federally protected rights, it is necessary to consider a preliminary contention urged by the state. The tenor of this contention is that under Nebraska law petitioner could not have his asserted federal rights determined in habeas corpus proceedings. . . . Nor can we lightly assume that Nebraska affords no corrective process for one who is imprisoned under a judgment rendered in violation of rights protected by the federal Constitution. That Constitution is the supreme law of the land, and 'Upon the state courts, equally with the courts of the Union, rests the obligation to guard and enforce every right secured by that Constitution.'¹⁴ . . . Because of this, and because a contrary conclusion would apparently mean that Nebraska provides no judicial remedy whatsoever for petitioner even though he can show he is imprisoned in violation of procedural safeguards commanded by the federal

¹² Article 116 of the Code of Criminal Procedure (1925) provides: "Every provision relating to the writ of habeas corpus shall be most favorably construed in order to give effect to the remedy, and protect the right of the person seeking it."

¹³ *Ex parte Slawson*, 141 S. W. 2d 609, 610; *Ex parte Jones*, 81 S. W. 2d 706; *Ex parte Spelce*, 119 S. W. 2d 1033, 1037; *Ex parte J. D. Carter*, 156 S. W. 2d 986 (Jehovah's witness, companion case to this in the C. C. A.); *Ex parte Faulkner*, 158 S. W. 2d 525; *Ex parte Baker*, 78 S. W. 2d 610; *Ex parte Patterson*, 58 S. W. 1011, 42 Tex. C. R. 256.

¹⁴ *Mooney v. Holohan*, 294 U. S. 104, 113, 55 S. Ct. 340, 342, 98 A. L. R. 406.

Constitution, we are unable to reach the conclusion that habeas corpus is unavailable to him under Nebraska law.¹⁵ . . .

“ . . . If petitioner can prove his allegations the judgment upon which his imprisonment rests was rendered in violation of due process and cannot stand.”¹⁶

The decision by the Court of Criminal Appeals of Texas is an arbitrary denial of the inherently secured right of habeas corpus. “The right to . . . the privilege of the writ of habeas corpus, are rights of the citizen guaranteed by the Federal Constitution.” (Justice Roberts’ opinion in *Hague v. C. I. O.*, supra, *Slaughter House Cases*, supra, and *Corfield v. Coryell*, supra). The evasion of determination of the federal questions presented to the Court of Criminal Appeals cannot be based on an adequate and independent non-federal ground.

In the case of *People of New York ex rel. Bryant v. Zimmerman*, 278 U. S. 63, 70, 71, this Court in dealing with a similar disposition of a federal question, and holding that the non-federal ground relied on was not adequate, stated:

“Our jurisdiction to review the decision is questioned also because of the nature of the case, it being a proceeding in habeas corpus brought to obtain the discharge of one who is held in custody to answer a charge of violating a state statute alleged to be invalid by reason of its conflict with the constitution of the United States. But we think our jurisdiction is in this regard so well established by prior decisions and long continued practice that it is not debatable. . . .

“The proceedings before us was not brought in an-

¹⁵ *Newcomb v. State*, 129 Neb. 69, 261 N. W. 348.

¹⁶ See also: *Mooney v. Holohan*, 294 U. S. 104, 114, and *Moore v. Dempsey*, 261 U. S. 86, 90. Compare: *Yick Wo v. Hopkins*, 118 U. S. 356, 373-374; *Herndon v. Lowry*, 301 U. S. 242; *Walker v. Johnston*, 61 S. Ct. 574, 579, 312 U. S. 275; *Johnson v. Zerbst*, 304 U. S. 458, 466; *Bowen v. Johnston*, 306 U. S. 19, 26; *American Jurisprudence*, Vol. 25, pages 148, 152, 179.

tagonism to the established practice of the state, but in entire keeping with that practice as confirmed by local statutes. . . .

"We are accordingly of opinion that the case and the judgment therein are of such a nature that we have jurisdiction to review the latter."

In the case at bar the habeas corpus proceedings and appeal to the Court of Criminal Appeals was brought in harmony and in entire keeping with the practice established and confirmed by the Court of Criminal Appeals of Texas. Therefore the judgment is of such a nature as to give this Court jurisdiction.

See the case originating in Texas decided by this Court, styled *Love et al. v. Griffith, et al.*, 266 U. S. 32, where this Court stated:

"When as here there is a plain assertion of federal rights in the lower court, local rules as to how far it shall be reviewed on appeal do not necessarily prevail.¹⁷ Whether the right was denied or not given due recognition by the Court of Civil Appeals is a question as to which the plaintiffs are entitled to invoke our judgment."¹⁸

The non-federal question is intermingled by the Court of Criminal Appeals with the federal question. That court holds that if the ordinance is unconstitutional on its face they have jurisdiction to consider the writ of habeas corpus, but if it is unconstitutional as construed and applied they do not have jurisdiction. This situation of itself so entangles the federal question as to give jurisdiction to this Court to consider even the *so-called* non-federal question, as well as the federal questions presented.

We insist that in view of the prior holdings of the Court of Criminal Appeals their decision in the case at bar is a

¹⁷ *Davis v. Wechsler*, 263 U. S. 22, 24.

¹⁸ *Ward v. Love County*, 253 U. S. 17, 22.

bald, outright evasion and subterfuge and an arbitrary holding for the sole purpose of suppressing the civil rights of the petitioner and it is a violation of the equal protection and due process clauses of the Fourteenth Amendment to the United States Constitution. *One need only consider the strong, reasonable and compelling dissenting opinion of Judge Graves of the Court of Criminal Appeals in this case to reach that conclusion.* R. 29.

In this, as well as companion cases of *Ex parte Largent* and *Ex parte Killam* in the Court of Criminal Appeals (also brought to this Court as companion cases on petitions for writs of certiorari) it is significant that the Court of Criminal Appeals did not dismiss the appeal for want of jurisdiction, as it would have done under the prevailing practice, had that court seriously believed that it did not have jurisdiction. If an appellate court does not have jurisdiction, as contended by the Court of Criminal Appeals, it would be obligated to sustain the motion to dismiss the appeal made by the State's Attorney in these cases. On the contrary, that court ignored the State's Attorney's motion to dismiss and affirmed the judgments of the trial courts in the three cases, remanding the petitioners to custody, thereby showing that the Court of Criminal Appeals considered the cases on the merits and that the *so-called* non-federal question is absolutely colorless and fictitious. The trial courts decided the cases on the merits and held the ordinances constitutional and found petitioners had not been denied their constitutional rights. The Court of Criminal Appeals affirmed the holding of the trial courts, therefore it cannot be said that the disposition made of these three cases is based on an adequate non-federal question.

On the question of depriving petitioner of her fundamentally secured right of habeas corpus before the Court of Criminal Appeals under Point Three of the Points Relied On for Appeal, she contended that habeas corpus was the proper remedy and that the Court of Criminal Appeals had jurisdiction. (R. 27-28) Since the Court of Criminal Appeals relied on Article 53 (C. C. P. of Texas) for the first

time, petitioner for the first time attacked this Article as being unconstitutional in her motion for rehearing. This is timely raising of that particular federal question. In *Brinkerhoff-Faris Trust and Savings Co. v. Hill*, 281 U. S. 673, this Court said:

“The plaintiff seasonably filed a petition for a rehearing in which it recited the above facts and asserted, in addition to its claims on the merits, that, in applying the new construction of Article 4 of Chapter 119 to the case at bar and in refusing relief because of the newly found power of the Commission, the court transgressed the due process clause of the Fourteenth Amendment. The additional federal claim thus made was timely, since it was raised at the first opportunity.¹⁹ The petition was denied without opinion.”

To permit the Court of Criminal Appeals of Texas to adversely, arbitrarily and with discrimination, escape the responsibility imposed upon it to protect the federal constitutional rights of its citizens within the border of that State by adopting arbitrary and inconsistent rules to apply to one class of citizens while employing a different set of rules or procedure with another class similarly situated, thereby denying the machinery of the courts to Jehovah's witnesses, is to greatly increase the burden of this Court. If the Court of Criminal Appeals of Texas is to thus escape its responsibility, then it makes necessary direct appeals from the County Courts of 254 Texas counties to this Court, thus greatly and unnecessarily increasing the burden of this Court.

It is an unwritten rule in the Texas trial courts that the determination of any federal or constitutional question is the primary duty of the Court of Criminal Appeals or the

¹⁹ *Missouri ex rel. Missouri Ins. Co. v. Gehner*, 281 U. S. 313. See further discussion of the inadequacy of the non-federal question involved in this case at pages 674, 675, 679 and 682 of the above *Brinkerhoff* case.

Supreme Court of Texas. When federal or constitutional questions are raised in the trial court, the trial judge promptly proceeds to overrule the contentions with the statement, 'Those questions must be determined by the Court of Criminal Appeals. I will hold the law constitutional. You can take that question to the Court of Criminal Appeals.' The Court of Criminal Appeals expressly shifts its responsibilities to the federal courts in the following language, "We have not said that appellant has no right to resort to the federal courts for relief on the federal question." See opinion on motion for rehearing in companion *Killam* case. R. 32, and *Killam* Record, pages 12, 13.

The resort to the remedy of habeas corpus in the District Courts of the United States is particularly circumscribed by the rules of this Court, which require that all remedies of appeal from the convictions be first resorted to in the state courts and from said state courts it is further the requirement of this Court, as a condition precedent to the writ of habeas corpus in federal courts, that a petition for certiorari or appeal be taken from the state courts to this Court. Thus it is manifest that habeas corpus in federal courts is not appropriate or adequate and the rule announced by the Court of Criminal Appeals would unduly burden this Court in matters coming from Texas and would require petitions for certiorari and appeals in every judgment of conviction entered against Jehovah's witnesses in 254 county courts of Texas.

If this situation that one can be incarcerated, resulting from a conviction in violation of his constitutional rights under an ordinance where the fine is less than \$100, be permitted to stand, all the cities of Texas will be deliberately encouraged to pass ordinances, and judges and juries of the trial courts to deliberately impose fines of less than \$100, and thus avoid the possibility of review, where protection of constitutional rights are denied by the conviction.

Suppose some local official did not like the activity of his opposing political candidate and his supporters in distrib-

uting literature which exposed corruption of such local official; the opposing candidate could doubtless be repeatedly arrested for "peddling" literature and fined not to exceed \$100, and thus the opposing candidate and his representatives would be "interned" for the duration of the political campaign or longer. Unless such a person paid out thousands of dollars for repeated petty fines imposed under \$100, he would be compelled to linger in jail while his enemies unjustly hoodwinked the people. Such an intolerable condition would well result to anyone in Texas who dared to exercise his political rights in a hotly contested political campaign. Anyone thus suppressed and who was unwilling or unable financially to pay the fines imposed would be compelled to take repeated appeals directly to the Supreme Court of the United States or else "lay it out" in jail; and, upon being released he could again be arrested, fined and incarcerated, repeatedly, until he spent his entire life in jail and all the while be denied his constitutional right of liberty. One's property and money do him little or no good, and bring him little or no joy, if he is incarcerated behind four walls in violation of his civil rights.

If the Texas courts can be permitted to turn a deaf ear to such who cry for help, and refuse to hear and consider the constitutional rights of one until he has been fined more than \$100, such condition will lead to intolerable results that find comparison only in the lands dominated by unadulterated Fascist and Nazi rule.

The thoughtful consideration of this petition for writ of certiorari leads to a different result. If the argument is carefully followed, the conclusion is inescapable that this Court has jurisdiction and that the petition for certiorari should be granted and the judgment and decision of the Court of Criminal Appeals should be reversed and set aside and held for naught.

It is submitted that this case is one calling for the exercise by this Court of its supervisory powers under 240(a) of the Judicial Code, 28 U. S. C. A. 347(a) and Rule 38,

par. 5, of this Court. To that end this petition for writ of certiorari should be granted so as to correct the errors complained of committed by, and the judgments rendered by, the Court of Criminal Appeals and the trial courts, against petitioner.

Respectfully submitted,

HAYDEN C. COVINGTON

Attorney for Petitioner



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CHARLES ELMORE JR.
CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1942

Nos. 348, 349, and 350

■

348 MRS. JOHN HILLEY, *Petitioner*

v.

WID SPIVEY, SHERIFF, *Respondent*

■

349 DAISY LARGENT, *Petitioner*

v.

JACK REEVES, *Respondent*

■

350 TULLY B. KILLAM, *Petitioner*

v.

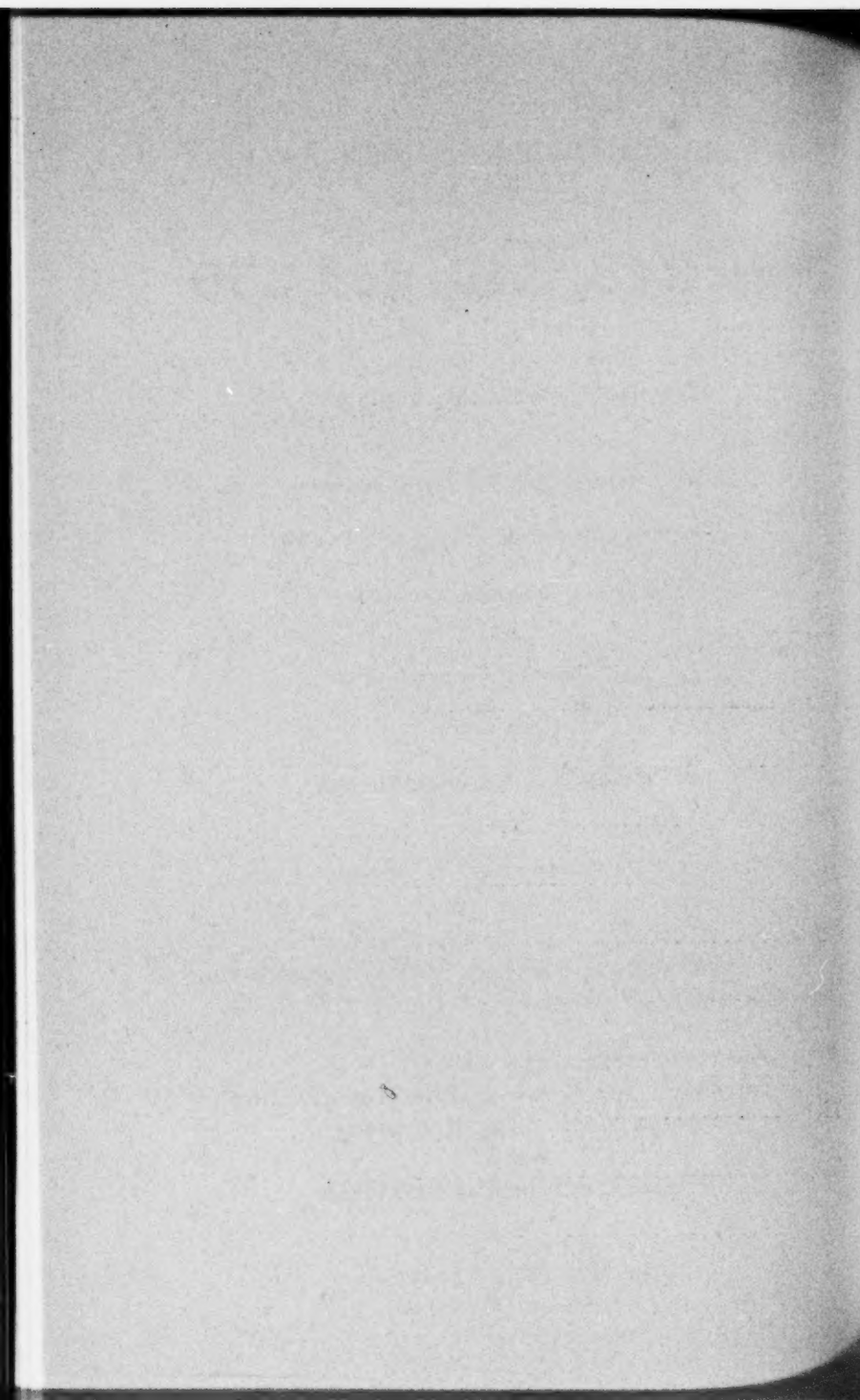
CITY OF FLORESVILLE, *Respondent*

■

ON PETITIONS FOR WRITS OF CERTIORARI TO THE
COURT OF CRIMINAL APPEALS OF THE STATE OF TEXAS

Petitioners'
Application for Leave to File Out of Time
Joint Motion for Rehearing
and
PROPOSED JOINT MOTION

HAYDEN C. COVINGTON
Attorney for Petitioners



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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1942

Nos. 348, 349, and 350



348 MRS. JOHN HILLEY, *Petitioner*

v.

WID SPIVEY, SHERIFF, *Respondent*



349 DAISY LARGENT, *Petitioner*

v.

JACK REEVES, *Respondent*



350 TULLY B. KILLAM, *Petitioner*

v.

CITY OF FLORESVILLE, *Respondent*



ON PETITIONS FOR WRITS OF CERTIORARI TO THE
COURT OF CRIMINAL APPEALS OF THE STATE OF TEXAS

Petitioners'

Application for Leave to File Out of Time

Joint Motion for Rehearing

and

PROPOSED JOINT MOTION

TO THE HONORABLE UNITED STATES SUPREME COURT:

Now come the above named petitioners in the above entitled and numbered causes and present this their application for leave to file out of time and urge their joint motion for rehearing.

At the time of this Court's action on the petitions for writs of certiorari it was assumed that the reason for denial of the writs was that the judgments of the Texas Court of Criminal Appeals were based on an adequate non-federal question, to wit, a recognized rule of procedure of the State of Texas on which the judgment of the state court was final. For such reason alone at such time the petitioners did not ask for a rehearing.

Since the denial of the petitions for writs this court has recently on December 21, 1942, in Nos. 558 and 559, indicated that petitioners' contention with respect to the right to the writ of habeas corpus in the state courts of Texas may be correct.

Petitioners felt that the questions had been fully presented and argued in the petitions for writs of certiorari and supporting briefs; but the aforesaid expression of this Court in the pending *Largent* and *Jamison* cases (Nos. 558 and 559) indicates that the Court inadvertently overlooked the same question presented in these cases; and therefore this motion is made to recall the Court's consideration of that question. This motion presents a concrete example of the *Texas rule* concerning which this Court desires enlightenment from counsel.

If it is held that the writ of habeas corpus resorted to by petitioners is a proper remedy then such will require a reconsideration of the questions presented in these petitions.

In all the circumstances and in view of said recent expression of this Court it seems fitting and proper that this Court reconsider the petitions for writs of certiorari.

Petitioners attach hereto and make a part hereof their proposed motion for rehearing.

Petitioners would show that the judgments against them are respectively for fines. They have executed and filed good and sufficient supersedeas bonds to indemnify respondents in the manner required by law. Petitioners are now each at large and have their liberty under said bonds and have not been taken into custody since denial of writs of certiorari by this Court. Therefore questions presented in the motion for rehearing are not moot.

These three cases present the same common question of availability of the remedy of habeas corpus in the courts of Texas and substantially similar questions as to validity of the ordinances involved. Because of these common and similar questions it is suggested that the Court permit the filing of a joint motion for rehearing.

WHEREFORE petitioners pray that the Court grant this application, that the motion be allowed to be filed and that the Court grant such other and further relief as appears proper and necessary in the circumstances.

MRS. JOHN HILLEY, *Petitioner*
 DAISY LARGENT, *Petitioner*
 TULLY B. KILLAM, *Petitioner*
 By HAYDEN C. COVINGTON

Attorney for Petitioners



CERTIFICATE

I, Hayden C. Covington, do hereby certify that the foregoing application for leave to file out of time a joint motion for rehearing is prepared and filed in good faith so that justice may be done and not for the purpose of delay.

HAYDEN C. COVINGTON
Attorney for Petitioners



SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1942

Nos. 348, 349 and 350



348 MRS. JOHN HILLEY, *Petitioner*

v.

WID SPIVEY, SHERIFF, *Respondent*



349 DAISY LARGENT, *Petitioner*

v.

JACK REEVES, *Respondent*



350 TULLY B. KILLAM, *Petitioner*

v.

CITY OF FLORESVILLE, *Respondent*



ON PETITIONS FOR WRITS OF CERTIORARI TO THE
COURT OF CRIMINAL APPEALS OF THE STATE OF TEXAS

Petitioners' **Joint Motion for Rehearing Duly Filed** **Pursuant to Leave of Court**

TO THE HONORABLE SUPREME COURT OF THE UNITED STATES:

May it please the court: Now come the above named petitioners and present this their motion for rehearing

within the sound discretion of the Court allowing the filing of said motion *out of time* at the present term of Court, and as grounds therefor show:

ONE

This Court should have exercised discretionary jurisdiction because the state courts below failed to hold the ordinances in question unconstitutional on their face and as construed and applied because it plainly appears that said ordinances unduly abridge, burden, deny and prohibit petitioners' rights of free speech, free press and freedom to worship Almighty God, contrary to the First and Fourteenth Amendments to the United States Constitution.

TWO

This Court should have exercised discretionary jurisdiction because the state courts below failed to hold the Paris and Floresville ordinances unconstitutional on their face because in excess of the police power and prohibiting the exercise of constitutional rights of freedom of press, speech and worship within the boundaries of said cities, contrary to the First and Fourteenth Amendments to the United States Constitution.

THREE

This Court should have exercised discretionary jurisdiction because there was presented in each petition for writ of certiorari directly, expressly and certainly the question of whether under the law and practice of Texas the judgments could be fully reviewed on the record by the Court of Criminal Appeals of Texas by habeas corpus proceedings employed by each petitioner before said court.

FOUR

This Court should have exercised discretionary jurisdiction because the Court of Criminal Appeals unlawfully

discriminated against Jehovah's witnesses and denied petitioners' inalienable and inherent right to a writ of habeas corpus in violation of the *due process* and *equal protection* clauses of the Fourteenth Amendment to the United States Constitution.

ARGUMENT

On December 21, 1942, in the cases of *Mrs. Ella Jamison*, appellant, v. *State of Texas*, No. 558, and *Daisy Largent*, appellant, v. *State of Texas*, No. 559, the Court says: "Counsel are requested to discuss in their briefs and on oral argument whether under the law and practice of Texas the judgment can be fully reviewed on this record by a higher State court by habeas corpus or other proceedings."

Such memorandum of request for discussion and argument persuades us to believe that this honorable Court inadvertently overlooked the precise question which is directly involved in these cases. The question is better presented in these cases for determination than can be considered in the *Jamison* and *Largent* cases.

In Texas the habeas corpus remedy is not a substitute for appeal; and in cases where no direct appeal lies to the Court of Criminal Appeals from the lower courts, as in these cases, there is available in certain circumstances the writ of habeas corpus. The writ of habeas corpus is entirely separate and distinct and in addition to the original criminal proceedings brought against the accused defendant. Habeas corpus is no part of the original criminal proceedings. It is not compulsory under the decisions of this Court to employ a writ or process as a condition precedent to approach to this Court by appeal or by petition for writ of certiorari; however, when the writ is employed and the federal questions properly presented even though denied this Court can review the judgment in the habeas corpus proceedings the same as and in addition to exercising its right to review directly the judgment attacked in

the habeas corpus proceedings. It is our view that this Court has jurisdiction in the *Jamison* and companion *Largent* cases and that the questions which this Court desires to consider with respect to the right of habeas corpus in those two cases can *only* be considered in these three cases. The question can not be properly decided in the *Jamison* and *Largent* cases; for even though this Court holds that habeas corpus is available as a remedy in the Texas courts it would not deprive this Court of jurisdiction on appeal. Under the state statutes of Texas, Code of Criminal Procedure Article 53, the right of appeal to any higher court is expressly denied. This statute gives right of a direct appeal to this Court, which step was properly taken in the pending *Jamison* and *Largent* cases.

This Court's ruling in these three cases has, in effect, approved the action of the Court of Criminal Appeals in holding that the remedy of habeas corpus was not available to Jehovah's witnesses in Texas under circumstances similar to this. Inasmuch as the Court now indicates that there is a serious question as to whether or not habeas corpus is available in the courts of Texas, it is necessary to clarify the confusion resulting from the opinion in *Ex parte Largent*, 162 S. W. 2d 419, and this Court's action in denying certiorari in such case.

It is to be noticed that the Texas Court of Criminal Appeals for the first time in its history of existence held that the remedy of habeas corpus was available in circumstances such as these *only when* the ordinance was and is void and unconstitutional on its face. That court for the first time held that it could not determine whether or not the ordinance was or is unconstitutional as construed and applied to the particular facts in the case. See *Ex parte Largent*, 162 S. W. 2d 419, opinion also appearing in the printed record in cause number 349, pages 24-35. This unusual holding is contrary to the previous decision of that court in *Ex parte Baker*, 127 Tex. Cr. R. 589, 78 S. W. 2d 610, 613, where that court said: "It is a familiar rule that

the validity of an act is to be determined *not alone* by its caption and phraseology [*on its face*], but also by its practical operation and effect [as construed and applied to the facts]." [Bracketed words added] The decision also conflicts with *Ex parte Patterson*, 58 S. W. 1011, 42 Tex. Cr. R. 256; *Ex parte Roquemore*, 131 S. W. 1101; and *Ex parte Faulkner*, 158 S. W. 2d 525.

The holding of the Court of Criminal Appeals has split in two that class of cases properly cognizable by habeas corpus. If the ordinance is void on its face that court says the remedy is available; but if the ordinance is valid on its face but unconstitutional as construed and applied it does not have jurisdiction.

In this holding the Court of Criminal Appeals refuses to exercise its duty of construing a statute or ordinance to determine whether or not it is applicable to a given admitted and undisputed state of facts. In this that court has completely abdicated its duties to protect the citizens of Texas from unconstitutional abridgment of their rights.

That court justifies such conclusion by holding that in habeas corpus proceedings it is precluded from viewing the facts of the case supporting the judgment attacked. Such conclusion is contrary to a host of cases where the court considered the facts. *Ex parte Roquemore*, 131 S. W. 1101, 60 Tex. Cr. R. 282; *Ex parte Wall*, 91 S. W. 2d 1065; *Ex parte Meador*, 248 S. W. 348; *Ex parte Degener*, 17 S. W. 1111, 1115, and *Ex parte Kearby and Hawkins*, 34 S. W. 635 (1962).

This Court has held, in *Mooney v. Holohan*, 294 U. S. 104, 113, that "Upon the state courts, equally with the courts of the Union, rests the obligation to guard and enforce every right secured by that Constitution."

The writ of habeas corpus is unquestionably one of the fundamental, inalienable rights of the citizen. *Slaughter House Cases*, 16 Wall. 36, 79; *Corfield v. Coryell*, 4 Wash. (U. S.) 371, 380. See also opinion of Mr. Justice Roberts in *Hague v. C. I. O.*, 307 U. S. 496.

In Texas the writ of habeas corpus is declared to be the principal bulwark of human liberty in that State. *Ex parte Calhoun*, 91 S. W. 2d 1047.

In cases where the petition for writ of habeas corpus was brought for the purpose of reviewing the evidence to determine whether or not it was sufficient, or whether or not there was evidence to sustain the conviction, the Court of Criminal Appeals universally held to the rule that if there was no constitutional question or if the judgment was not void, it would not review by habeas corpus said judgment of conviction in instances where the case originated in the justice or corporation courts and the fine imposed on trial de novo did not exceed \$100 and costs. To do so is held to be employing the writ to do indirectly what is prohibited directly by the Code of Criminal Procedure, Article 53. *Ex parte Kent*, 49 Tex. Cr. R. 12, 90 S. W. 168; *Ex parte Rogers*, 83 Tex. Cr. R. 152, 201 S. W. 1157, and *Ex parte Slawson*, 139 Tex. Cr. R. 607, 141 S. W. 2d 609.

There are many recognized exceptions to the above rule. We now turn to a discussion of the cases recognizing these exceptions for the purpose of showing that the decision of the court in the *Largent* case is fictitious evasion of a properly raised federal question and that the judgment of the court below is not based upon an adequate non-federal question.

In instances where the Court of Criminal Appeals found the ordinance or statute to be unconstitutional on its face the writ of habeas corpus has been unhesitatingly sustained to release one held under a judgment of conviction in the county court on trial de novo in appeals from the justice and corporation courts. In *Ex parte Patterson*, 42 Tex. Cr. R. 256, 58 S. W. 1011, the ordinance was void on its face because it prohibited a bowling alley within 100 yards of a residence. In *Ex parte Spelce*, 119 S. W. 2d 1037, a Dodd City ordinance prohibiting dance hall within 400 feet of churches was held void on its face. *Ex parte Faulkner*, 158 S. W. 2d 525, holds the "Green River" ordinance of Canyon

unconstitutional according to its unreasonable terms. *Ex parte Farnsworth*, 61 Tex. Cr. R. 342, 135 S. W. 535, holds an ordinance of Dallas establishing a commission to fix telephone rates, etc., unconstitutional on its face. In *Ex parte Battis*, 40 Tex. Cr. R. 112, 48 S. W. 513, it was an ordinance prohibiting commercial vehicles for hire from parking on certain downtown streets. *Ex parte Neill*, 32 Tex. Cr. R. 275, 22 S. W. 923, holds void a Seguin ordinance prohibiting sale in the city of a certain newspaper declared a nuisance. In *Ex parte Garza*, 28 Tex. Cr. R. 381, a San Antonio ordinance licensing bawdy houses held void on its face.

Prior to the decision of the Court of Criminal Appeals in *Ex parte Largent*, 162 S. W. 2d 419, it was uniformly held that even though the law be valid on its face, if the statute or ordinance did not apply to the facts in the case the defendant was not guilty and was entitled to a discharge by writ of habeas corpus when convicted on trial de novo in the county court and fined not more than \$100. In *Ex parte Roquemore*, 131 S. W. 1101, 60 Tex. Cr. R. 282, the writ was granted to discharge the accused who had been convicted of violating the Sunday Law of Texas. He operated a baseball park and baseball game on Sunday. It was held that the statute when properly construed did not cover the activity of the defendant and on the admitted facts he was not guilty. This case was cited with approval by Judge Hawkins in *Ex parte Jarvis*, 3 S. W. 2d 84. In *Ex parte Jonischkiss*, 227 S. W. 952, 88 Tex. Cr. R. 574, it was held that the writ of habeas corpus was available to release one charged with a violation of a city traffic ordinance where the admitted facts did not constitute a crime under the law of Texas. In *Ex parte Butcher*, 53 S. W. 2d 781, 122 Tex. Cr. R. 39, an application for writ of habeas corpus was granted because the court declared that the operator of a laundry did not come within the provisions of a statute prohibiting labor of females more than 54 hours per week. See also

Ex parte Wall, 91 S. W. 2d 1065; and *Ex parte Jones*, 81 S. W. 2d 706.

Before the decision in *Ex parte Largent*, supra, it was consistently held by the Court of Criminal Appeals that whether an ordinance is constitutional depends on the facts to which it is applied. In *Ex parte Baker*, 127 Tex. Cr. R. 589, 78 S. W. 2d 610, 613, the ordinance fixing fees on non-resident business representatives was held to be arbitrary and violative of the 14th Amendment as applied. The writ of habeas corpus was granted. In that case the court said: "It is a familiar rule that the validity of an act is to be determined not alone by its caption and phraseology, but also by its practical operation and effect." In *Ex parte Lewis*, 45 Tex. Cr. R. 1, 73 S. W. 811, it was held that an ordinance valid on its face was unconstitutional because of the provisions of the city charter which was introduced in evidence. In *Ex parte Mihlfread*, 128 Tex. Cr. R. 556, 83 S. W. 2d 347, it was held that an ordinance providing for the license tax upon certain occupations was void because high, excessive and confiscatory under the circumstances of the case. In *Ex parte Ernest*, 136 S. W. 2d 595, 138 Tex. Cr. R. 441, an ordinance providing for sanitary inspection of bakeries was held valid as applied to institutions within the city but invalid as applied to institutions located outside the city. The court considered the evidence. In *Ex parte Kennedy*, 78 S. W. 2d 627, Judge Hawkins wrote the opinion on rehearing. On the original hearing the ordinance was held to be constitutional on its face and the writ was held properly denied. On rehearing, concerning the relator's attack upon the zoning ordinance the court said: "Relator seems to concede that said case is decisive of the question as to the *general attack* upon the constitutionality of said ordinance, but urges that it should be held unconstitutional, *as it relates to the restriction in the use of the particular property of relator involved in the prosecution.*" The court then inquires into the question as to whether the *valid ordi-*

nance has been applied in an unconstitutional manner, and holds that it is not violative of the Federal Constitution as applied. In *Ex parte Stein*, 135 S. W. 136, 61 Tex. Cr. R. 320, the court inquired into the evidence to determine the constitutionality of an ordinance. See *Ex parte Degener*, 17 S. W. 1111, 1114; *Ex parte Kearby*, 34 S. W. 635; 34 S. W. 962; and *Ex parte Dreibelbis*, 133 Tex. Cr. R. 83, 109 S. W. 2d 476.

In his opinion in the *Largent* case Judge Hawkins does not cite or discuss any of the foregoing cases but contents himself with a consideration of the cases originating in the justice or corporation court where there was no constitutional question involved and where habeas corpus was invoked as a substitute for appeal to review the sufficiency of the evidence. *Ex parte Slawson*, 139 Tex. Cr. R. 607, 141 S. W. 2d 609, is said to be controlling. There the defendant was convicted of breaching the peace and contended there was no evidence showing guilt. The case was not within the exception allowing use of the writ in such cases. What was contended in the *Largent* case was that the admitted facts or undisputed evidence showed that relator was not within the terms of the ordinance and if considered within such provisions then such application of the ordinance to the undisputed evidence violated the Federal Constitution.

Concerning the host of cases above enumerated Judge Hawkins in *Ex parte Largent*, supra, says: "If some cases from this court may be found which seem to be in conflict with such holding they are out of harmony with said Art. 53 and the great number of cases construing said article. Either that, or the claimed conflict is more apparent than real." (*Largent* R. 27) This shows that the real issue was evaded by that court. The dissenting opinion of Judge Graves in the *Largent* case clearly establishes the fact that the majority holding was fictitious, arbitrary and contrary to the established precedent of Texas.

Unless this Court so holds and reverses the *Largent* case it will be impossible now to say that there is an op-

portunity for a full review of a judgment of this sort in a higher court of Texas by way of writ of habeas corpus.

We insist that in view of the prior holdings of the Court of Criminal Appeals its decision in the case at bar is a bald, outright evasion and subterfuge and an arbitrary holding for the sole purpose of sidestepping the real federal question presented and to add to the suppression of the civil rights of the petitioners. *The refusal of the court to pass on the federal question properly presented is itself a denial of due process and is a federal question.* Because the judgment is not based on an adequate non-federal question this Court should take jurisdiction and consider all questions raised, including those which the Court of Criminal Appeals refused to consider. This action can be now taken on the authority of *People ex rel. Bryant v. Zimmerman*, 278 U. S. 63, 70-71; *Rogers v. Alabama*, 192 U. S. 226, 230-231, where motion to quash struck because prolix and verbose; *Davis v. Wechsler*, 263 U. S. 22, 24, where waiver of venue was claimed by appearance; *Love v. Griffith*, 266 U. S. 32, where appeal dismissed because of alleged moot question; *N. Y. C. Ry. Co. v. N. Y. & Pa. Co.*, 271 U. S. 124, 126-127, where failure to appeal from former ruling held to be excuse for not considering questions; *German Savings & Loan Soc. v. Dormitzer*, 192 U. S. 125, 128, where estoppel held not to be sufficient to deny consideration of federal question; and *Patterson v. Alabama*, 294 U. S. 600, 603-607, where motion for new trial and bill of exceptions containing evidence struck by court.

The right to the remedy of habeas corpus is particularly discussed in greater detail in the petitions for writs of certiorari. See dissenting opinion of Judge Graves. *Largent* record pp. 28-35. See also *Hilley* petition pp. 13-16, 23-32; *Largent* petition pp. 18-23; *Killam* petition pp. 15-18. See motion for rehearing in *Largent* case, R. 36-45. We do not here repeat what is there said: Reference to such argument should be sufficient to direct this Court's attention thereto.

Federal Question Properly Raised and Considered Below

HILLEY CASE

The constitutionality and validity of the ordinance was duly raised in all of the courts below. On the trial *de novo* in the County Court by motion to quash (R. 8-10, 11-12), by requested charge number one (R. 10-11), by motion for directed verdict at the close of all the evidence (R. 20), and by specific allegations in the application for writ of habeas corpus filed in the District Court, petitioner attacked the ordinance in question as being in violation of the First and Fourteenth Amendments to the United States Constitution, because by its terms and as construed and applied, petitioner was denied her rights of freedom of press and worship of Almighty God.

In the Court of Criminal Appeals it was properly contended that the ordinance was unconstitutional and void, both on its face and as construed and applied. R. 27-28.

When the Court of Criminal Appeals, for the first time in its opinion filed in this case held that *habeas corpus* was not a proper remedy to relieve the petitioner of the unconstitutional judgment the petitioner duly attacked such holding for the first time that the holding denied petitioner the right of habeas corpus, contrary to the Fourteenth Amendment, in a motion for rehearing. (R. 30-32) This was a timely presentation. *Brinkerhoff-Faris Trust & Savings Co. v. Hill*, 281 U. S. 673; *Missouri ex rel. Missouri Ins. Co. v. Gehner*, 281 U. S. 313.

It is noticed that the Court of Criminal Appeals says that the court would entertain the writ of habeas corpus if the ordinance in question is void on its face. The only discussion by the court on this question was: "The ordinance was not violative of the Constitution." It is indeed amusing how lightly judicial precedent is spurned and disregarded by the Court of Criminal Appeals. In a pre-

vious decision that court had declared that the identical license tax ordinance of another city of Texas was void on its face and unconstitutional because in excess of the police powers of the state and in excess of its legislative authority. We make reference to the case of *Ex parte Dreibelbis*, 109 S. W. 2d 476. In that case the law was identical with the ordinance here. In that case the fine was only \$1 in both the city and the county court. In that case the Court of Criminal Appeals said: "The fact that the tax is denominated a license fee does not make it such when in fact it appears from the face of the ordinance that the sum levied and denominated a license fee is not levied for the purpose of regulating the enumerated business, but to raise revenue. It appears to us that said ordinance is violative of section 1 of article 8 of our Constitution. The state has not levied an occupation tax on persons engaged in business of this character designated in said ordinance. A city under its police powers, does not have the legal right to levy an occupation tax, unless the state has levied such a tax." See also *Ex parte Terrell*, 40 Tex. Cr. R. 28, 48 S. W. 504; *ABC Storage and Moving Co. v. City of Houston* (Tex. Civ. App.) 269 S. W. 882.

This is further evidence of the manifest discrimination on the part of the Court of Criminal Appeals against petitioners in these cases.

It is manifest that the license tax in this case is also unconstitutional and violative of the United States Constitution, First and Fourteenth Amendments, because of its imposition of a burden upon the freedoms guaranteed and secured by those amendments. See *Hilley* petition pp. 11-13, 19-23.

See also petitions for writs of certiorari in *Busey et al. v. District of Columbia*, No. 235 October Term 1942; *Douglas et al. v. Jeannette et al.*, No. 450; *Murdock et al. v. Commonwealth et al.*, Nos. 480-487, and the motion for rehearing in *Jones v. Opelika*, etc., 316 U. S. 584-624, all of which are now pending here and undetermined on the same question.

A reading of those documents, which we incorporate herein by reference, conclusively shows that there is presented not only a substantial federal question but one of the most grave and serious questions that this Court has had to consider in its entire history of existence. The seriousness of the question presented and the arbitrary action by the court below in sidestepping the real controversy on a colorless technicality warrant a reconsideration by this Court of the petition for writ of certiorari in the *Hilley* case which commands that the Court grant the same.

LARGENT CASE

In the application for writ of habeas corpus in the District Court petitioner alleged that she was illegally restrained of her liberty. (R. 1) Under the Texas practice this allegation draws in question all federal and state constitutional questions as to whether or not the judgment of conviction is void. *Ex parte Calhoun*, 91 S. W. 2d 1047; *Ex parte Travis*, 123 Tex. Cr. R. 480, 273 S. W. 483, 489; *Ex parte Cox*, 53 Tex. Cr. R. 240, 109 S. W. 369; *Ex parte Mato*, 19 Tex. Cr. R. 112; *Ex parte Cain*, 56 Tex. Cr. R. 538, 120 S. W. 999; *Ex parte Walsn*, 59 Tex. Cr. R. 409, 129 S. W. 118; *Ex parte Patterson*, 42 Tex. Cr. R. 256, 58 S. W. 1011. The trial court under these allegations said: "The sole question is whether or not it is a valid ordinance." (R. 12, 16) In the Court of Criminal Appeals the constitutionality of the ordinance was attacked both on its face and as construed and applied because violating the First Amendment and denying due process of law in excess of the police powers of the City of Paris, contrary to the Fourteenth Amendment. (R. 20-21) The Court of Criminal Appeals specifically considered and decided these two *federal* questions, and held the ordinance constitutional on its face. R. 24-25.

This was a sufficient, proper and timely way of raising a constitutional question. Under the practice of Texas a constitutional question can be raised at any time, for the

first time on appeal or on motion for rehearing in the appellate court. *City of Amarillo v. Tutor*, 267 S. W. 697; *Hoffman v. State*, 20 S. W. 2d 1057; *Burnes v. State of Texas*, 75 Tex. Cr. R. 188, 170 S. W. 550; *Gohlman, etc. v. Whittle*, 273 S. W. 808; *Texas Jur.*, Vol. 9, p. 469.

Under the accepted and recognized procedure of this Court, if an appellate court actually considers a federal question presented to it the first time and actually decides the federal question for the first time in the appellate court, it is sufficient, adequately and timely raised so as to require this Court to consider and decide the question. *People of New York ex rel. Bryant v. Zimmerman*, 278 U. S. 63, 66-69, 70-71; *Stewart v. Kahn*, 11 Wall. 493, 494, 495, 499, 500-502. In these cases the federal question as to constitutionality of the ordinances on their face under the Federal Constitution was actually considered. In *Manhattan Life Ins. Co. of New York v. Cohen*, 234 U. S. 123, 134, this Court said that it is an "elementary rule that it is irrelevant to inquire how and when a Federal question was raised in a [state] court . . . when it appears that such question was actually considered and decided." See also *Northwestern Bell Telephone Co. v. Nebraska State Railway Commission*, 297 U. S. 471, 473.

Please note that under the record the federal questions with respect to the unconstitutionality of the ordinances were timely and properly raised, because under the law of Texas such questions could be raised at any time as late as the motion for rehearing. The judgment of the court is based on want of jurisdiction, which is fictitious, and not that the questions were improperly or untimely raised. In so far as the ordinances in question are held to be constitutional on their face, there can be no doubt that the Court of Criminal Appeals considered and passed on such federal questions. Being so, it is immaterial to this Court that such federal questions are not fully raised in the *Largent* and *Killam* cases in the trial court because the Court of Criminal Appeals passed upon same. This was the holding of this

Court in the case of *Home Ins. Co. v. Dick* (1930) 281 U. S. 397, 407, where the Texas Supreme Court was reversed on federal questions not raised in the trial court but considered by the State Supreme Court.

It must also be noticed that the question of the unconstitutional denial of the writ of habeas corpus contrary to the Fourteenth Amendment was presented for the first time in the motion for rehearing. This was the first opportunity which petitioner had of urging the question to the court below. The motion was overruled. This was a timely presentation of this federal question. See *Brinkerhoff-Faris Trust & Saving Co. v. Hill*, 281 U. S. 673.

The ordinance in question is unconstitutional and void on its face. See *Lovell v. Griffin*, 304 U. S. 444; *Schneider v. State*, 308 U. S. 147.

The fact that it may be a convenience to a municipality to prevent the selling of newspapers, literature and pamphlets upon the street is not justification for abridging or denying the rights of persons upon the streets to use the sidewalks for information and for distribution of literature. In the case of *Schneider v. State*, supra, Mr. Justice Roberts speaking for the United States Supreme Court said: "But as we have said, the streets are natural and proper places for the dissemination of information and opinion; and one is not to have the exercise of his liberty of expression in appropriate places abridged on the plea that it may be exercised in some other place. . . . the answer is that considerations of this sort do not empower a municipality to abridge freedom of speech and press. . . ."

In that case ordinances which prohibited the use of the streets of various cities for the purpose of distributing handbills and leaflets were declared unconstitutional, because as construed and applied they abridged petitioners' rights of freedom of speech and of press. The ordinances there knocked down cannot be distinguished from the ordinance here questioned. The case of *Hague v. C. I. O.*, 307 U. S. 496, 501, 518, invalidates an ordinance forbidding any person to

"distribute or cause to be distributed or strewn about any street or public place any newspaper, paper, periodical, book, magazine, circular, card, or pamphlet." In that case the court said: "But it must not in the guise of regulation be abridged or denied." See also *Thornhill v. Alabama*, 310 U. S. 88, and *Carlson v. California*, 310 U. S. 106, where the ordinances and statutes prohibiting the carrying and displaying of signs that might cause a breach of the peace or obstruct traffic were declared invalid and void because abridging the fundamental personal rights and freedoms guaranteed by the Constitution.

In *Jones v. Opelika*, 316 U. S. 584, 595-596, 62 S. Ct. 1231, Mr. Justice Reed, speaking for the majority of this Court, said: "Ordinances absolutely prohibiting the exercise of the right to disseminate information are, *a fortiori*, invalid."

Even when applied to commercial peddling of ordinary articles of merchandise the ordinance in question comes clearly within the prohibition of the above mentioned cases and there is no valid reason that can be advanced to sustain the validity of the ordinance. See Freund's "The Police Power", page 133. The prohibition of the use of the streets is invalid because constitutional guarantees cannot be made to yield to mere convenience. *Weaver v. Palmer Bros. Co.*, 270 U. S. 402. See also *Smith v. Texas*, 233 U. S. 630; *Dobbins v. Los Angeles*, 195 U. S. 223; *Jacobson v. Massachusetts*, 197 U. S. 11, 25; *Eubank v. Richmond*, 226 U. S. 137; *Panhandle Eastern Pipe Line Co. v. State Highway Commission*, 294 U. S. 613, 622.

In the case of *Schneider v. State*, supra, it is said: "Mere legislative preferences or beliefs respecting matters of public convenience may well support regulations directed at other personal activities, but be insufficient to justify such as diminishes the exercise of rights so vital to the maintenance of democratic institutions." In *Hannan v. Haverhill*, 120 F. 2d 87, it is said: "Restrictions properly applicable to hawkers and peddlers selling ordinary articles of merchandise on the streets might not be appropriate to

regulate the sale and distribution of literature of the sort offered for sale by the plaintiffs." See also *United States v. Carolene Products Co.*, 304 U. S. 144, 152 and footnote.

In the cases of *Zimmermann v. Village of London*, 38 F. Supp. 582, and *Donley v. City of Colorado Springs*, 40 F. Supp. 15, ordinances which prohibited peddlers from entering premises of residents in the city without prior invitation were held unconstitutional when applied to activity of Jehovah's witnesses because of the *first and fourteenth* amendments to the Federal Constitution. In the *Donley* case, *supra*, the court held that the ordinance would have been valid when applied to ordinary articles of merchandise.¹

We have searched the reports for a case in point where the identical kind of ordinance is involved and find only the case of *Ex parte Walrod*, 120 P. 2d 783, decided by the Oklahoma Criminal Court of Appeals, where that court had before it for review the case of one of Jehovah's witnesses who had been unlawfully imprisoned and restrained in the city jail of Stillwater, Oklahoma, for the alleged violation of Ordinance No. 611 of that city holding unlawful the distribution of literature "on the streets and sidewalks of the congested business district of the City of Stillwater, Oklahoma, and said congested business district is defined as being the territory included from Fifth Avenue to Eleventh Avenue and between Hudson Street and Lewis Street." The ordinance was held to be unconstitutional and void because abridging the rights of freedom of speech and of the press contrary to the state and federal constitution. See also *Ex parte Winnette*, 121 P. 2d 312.

While the ordinance does not prohibit distribution of literature in the entire city by name it does prohibit in its practical effect because the main business district of the city which is the only likely place that one would want to

¹ Compare *White v. Town of Culpeper*, 172 Va. 630; *City of Orangeburg v. Farmer*, 181 S. C. 143; *De Berry v. La Grange*, 8 S. E. 2d 146; *City of Columbia v. Alexander*, 119 S. E. 241.

distribute literature is included within its prohibitory terms. A person disseminating ideas by pamphlet form on a political, educational, religious, Bible or "Christian" subject would not desire to stand in a desolate or out-of-way place to circulate his ideas where there were only few people, but a reasonable person necessarily must go and is guaranteed the right to go to a place where he is likely to contact the most people, such as the public streets and sidewalks of the business section of the city. The fact that such are crowded at times does not allow a prohibition of the right as long as the distributor does not abuse the privilege by *himself* blocking the sidewalk or obstructing traffic, etc., in which event he can be punished for the abuse under a law directed at the abuse; but he cannot be denied the right to use the streets under prohibitory ordinances, because such ordinances are void. It should be mentioned here that the undisputed evidence shows that petitioner did not abuse the exercise of such rights. She did not obstruct traffic, block the sidewalks, nor did she annoy or offend any one—on the contrary, she acted properly and in an appropriate manner.

The City of Paris is a community of about 18,000 people and the area prescribed in the ordinance includes practically the entire downtown district. It includes the entire section of the town where people are likely to come in great numbers to shop, attend theaters, make purchases at the market, and do other business at night time and particularly all day Saturday and Saturday night. It is at such times and places that one desiring to disseminate information and opinion would exercise press activity. If he is denied the right to exercise such activity in and around the business district he is in fact denied the right to exercise such right anywhere within the city, for one would not desire to stand on a desolate street corner in the residential area, where only few or no people pass, to distribute literature. In fact the officials of the City of Paris have stated, "These named "appropriate places" are denied you for

the purpose of exercising your liberty because "it may be exercised in some other place" such as the unused residential area and other places in the city which are not frequented by visitors.' This is exactly what was condemned by this Court in the *Hague* case and in the *Schneider* case.

The City of Paris has isolated a certain portion of the city and designated it, in effect, as the "most holy" spot in the city and excluded therefrom every person who might desire there to exercise his fundamental personal rights guaranteed by the Constitutions. It discriminates against such persons in favor of the established merchants, with whom petitioner does not compete, and who operate commercial stores dealing in ordinary goods, wares and merchandise of the "butcher, baker and candle-stick maker" variety. The city has thus erected a legal "Chinese wall" around such area of the city for the benefit of such persons and admits therein only those who come to deal with said merchants. The unique need and qualities of such established commercial merchants and their customers do not justify the action of the city in denying the use of the streets which, according to *Hague v. C. I. O.*, supra, and *Schneider v. State*, supra, are dedicated to the general public welfare and for use by ALL persons for lawful and constitutional purposes. There is no showing or contention on the part of the city that can justify the use of the ordinance to abridge fundamental personal rights. There is no showing that the exercise of such rights on the streets presents such a problem of "clear and present danger" that the traffic upon the streets and sidewalks of the area would be interrupted by persons distributing literature. A lawful business cannot be subjected to unreasonable regulations or prohibitions under the police power having no reasonable relation to public safety. *State v. Paille*, 90 N. H. 347.

In further consideration of the question here presented reference is made to *Commonwealth v. Johnson*, 35 N. E. 2d 801; *Commonwealth v. Reid*, 144 Pa. S. C. 569, 20 A.

2d 841; *Lovell v. Griffin*, 303 U. S. 444; *Cantwell v. Connecticut*, 310 U. S. 296; *Douglas v. City of Jeannette*, 39 F. Supp. 32; *Hough v. Woodruff*, 147 Fla. 299, 2 So. 2d 577; *Kennedy v. City of Moscow*, 39 F. Supp. 26; *State v. Greaves*, 112 Vt. 222, 22 A. 2d 497; *Wilson v. Russell*, 146 Fla. 539, 1 So. 2d 569; and *Beeler v. Smith*, 40 F. Supp. 139.

The ordinance is not regulatory as to time and place, but it is *prohibitory* as to time and place. There is no time and no place within the area included by the ordinance that one can exercise his activity secured by the Constitution against abridgment. It is manifest that the ordinance is *prohibitory* by its terms and this question does not deserve further argument.

Again we remind the Court that the ordinance of the City of Paris is entirely different from the ordinance involved in the appeal from the County Court of Lamar County. See pages 3-4 of the petition of this case and pages 2-3 of the JURISDICTIONAL STATEMENT in *Largent v. State of Texas*, No. 559, October Term 1942.

KILLAM CASE

In the application for writ of habeas corpus filed in the County Court petitioner alleged that the ordinance denied him his constitutional rights of freedom of press and of worship of Almighty God. (R. 4) This was more than required by the Texas procedure. See cases cited with *Ex parte Calhoun*, supra, pages 10-17 et seq., this brief.

In the Court of Criminal Appeals the ordinance was attacked as void on its face and as construed and applied because contrary to the First and Fourteenth Amendments to the United States Constitution and in excess of the police powers because of its prohibitory nature. (R. 15) The Court of Criminal Appeals considered the questions as to whether void on its face and held in favor of the validity of the ordinance. (R. 12-13) The federal questions were adequately presented and determined by the court

below. *People of New York ex rel. Bryant v. Zimmerman*, 278 U. S. 63, 66-69, 70-71; *Manhattan Life Ins. Co. of New York v. Cohen*, 234 U. S. 123, 134.

The ordinance was void on its face because prohibitory of all press activity in the city. See pages 19 to 24, *supra*.



This Court should have clearly in mind that two federal questions are here presented. *First*: Whether or not the ordinances are violative of the Federal Constitution for the reasons stated. *Second*: Whether or not the Court of Criminal Appeals discriminated against petitioners so as to deny them their inalienable right of habeas corpus contrary to the *due process* and *equal protection* clauses of the Fourteenth Amendment to the United States Constitution.

As to the *Hilley* case there can be no question that the presentation of the federal question in respect to the ordinance questioned was presented in conformity with the strictest requirement of this Court; and by reason thereof, as to that case, the question is properly before this Court.

As to the *Largent* and *Killam* cases it is plain that the federal questions were presented to the trial court in conformity with the *state practice*, and that even when considered as not having been raised until the cases reached the Court of Criminal Appeals such federal questions here presented were expressly presented to that court in harmony with the prevailing state practice. (*Largent* R. 20-21; *Killam* R. 15-16) This was timely under Texas practice. *Ex parte Calhoun*, pp. 10-17 et seq., *supra*, this brief.

The Court of Criminal Appeals actually considered the federal questions presented as to whether the ordinances were void on their face. *Largent* R. 24-25; *Killam* R. 8-9.

In all three cases the federal questions with respect to the ordinances were properly and timely presented and were passed upon sufficiently by the Court of Criminal Appeals to require consideration by this Court.

With respect to the *Second* question, page 25, *supra*, this brief, as to whether or not there has been an unconstitutional discriminatory denial of the writ of habeas corpus, there cannot be any doubt that the question was timely and properly presented to the Court of Criminal Appeals. This Court has uniformly held that where a "*surprise*" holding is rendered by an appellate court which makes it impossible to raise the question sooner the motion for rehearing is timely method of presenting the question. The denial of the motion constituted a sufficient passing upon the question to give this Court jurisdiction. See *Brinkerhoff-Faris T. & S. Co. v. Hill*, 281 U. S. 673.

This Court should grant the petitions for writs of certiorari as was done by this Court in *Tinsley v. Anderson*, 171 U. S. 101, 105. In that case this Court said:

"But the appellate jurisdiction of this Court from the state court extends to a final judgment or decree in any suit, civil or criminal in the highest court of a state where a decision in the suit could be had, against a title, right, privilege, or immunity, specially set up and claimed under the Constitution or a treaty or statute of the United States. Rev. Stat. 709. Consequently, if the order of the Court of Criminal Appeals of the State of Texas, being the highest court of the state having jurisdiction of the case, dismissing the writ of habeas corpus issued by one of its judges, and remanding the prisoner to custody, denied to him any right specially set up and claimed by him under the Constitution, laws, or treaties of the United States, it is doubtless reviewable by this Court on writ of error [and writ of certiorari]." [Bracketed words added]

Under all the circumstances this Court must assume jurisdiction in these cases to prevent a rank injustice being done the petitioners. In *Cohens v. Virginia* (1821) 6 Wheat. 264, 404, Mr. Chief Justice Marshall said:

"It is most true that this court will not take jurisdiction if it should not; but it is equally true that it must take jurisdiction if it should. The judiciary cannot, as the legislature

may, avoid a measure because it approaches the confines of the Constitution. We cannot pass it by because it is doubtful. With whatever doubts, with whatever difficulties, a case may be attended, we must decide it, if it be brought before us. We have no more right to decline the exercise of jurisdiction which is given than to usurp that which is not given. The one or the other would be treason to the Constitution. Questions may occur which we would gladly avoid, but we cannot avoid them. All we can do is to exercise our best judgment, and conscientiously perform our duty."

The statement of this Court on December 21, 1942, to the effect that it desires counsel in the *Jamison* and *Largent* appeals to brief the question of "whether under the law and practice of Texas the judgment can be fully reviewed on this record by a higher State court by habeas corpus or other proceedings", certainly cast grave uncertainty as to the correctness of this Court's rulings in these cases.

If this Court rules that the remedy was available in a higher court of Texas, then the Court of Criminal Appeals was wrong in its decisions in these cases. If this Court concludes that the remedy of habeas corpus is available, then it would be proper to reverse the judgments of that court in these cases and direct that court to consider the question of whether or not the ordinances were unconstitutional *as construed and applied*. If this Court dismisses the appeal in the *Jamison* and companion *Largent* cases for this reason, then the appellants in those cases, the petitioners in these cases, and all other of Jehovah's witnesses similarly situated would not have a remedy in the state courts because the decisions in the present cases stand as the law of the State of Texas. The judgment of the Court of Criminal Appeals in these cases then will continue to stand and will not be reversed by a holding of "want of jurisdiction" in the *Largent* and *Jamison* appeals. Therefore the questions presented in these cases are so serious and substantial that they deserve a further and full discussion of the question involved. The procedural question which the Court

wants discussed in the *Jamison* and companion *Largent* cases is directly involved in these cases. To the end that a full discussion can be had the order and judgment of this Court heretofore rendered denying the three petitions for writs of certiorari should be set aside and held for naught and an order rendered granting certiorari on each of the three petitions for writs of certiorari.

Petitioners would show that although the notice has been issued by this Court to the courts below of the denial of certiorari in each of these cases, at this time petitioners are at liberty under bond which indemnifies the respective judgments rendered against them and none of them have as yet served their time in jail to satisfy the fines imposed. Therefore the controversy in these cases is still alive and the questions here presented are not moot.

WHEREFORE, each petitioner prays that the orders and judgments heretofore entered in each of the above entitled and numbered causes denying certiorari be set aside and held for naught and that on this motion for rehearing, the petitions for writs of certiorari, and the supporting briefs, the Court issue a writ of certiorari in each case to the Court of Criminal Appeals of Texas directing such court to certify to this Court for review and determination on a day certain to be therein named, a full and complete transcript of the record and all proceedings in the case as numbered and entitled on the docket of said court; and that the decrees of the said court affirming the judgment of each trial court be reversed and that each of your petitioners have such other and further relief in the premises as to this Court may seem just and proper under the circumstances.

MRS. JOHN HILLEY, *Petitioner*
DAISY LARGENT, *Petitioner*
TULLY B. KILLAM, *Petitioner*

By HAYDEN C. COVINGTON
Attorney for Petitioners

C E R T I F I C A T E

I, Hayden C. Covington, do hereby certify that the foregoing motion for rehearing is prepared and filed in good faith so that justice may be done, and not for the purpose of delay.

HAYDEN C. COVINGTON

[Office and Post Office Address:
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